

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DANE C. JOHNSON and KATHLEEN  
M. JUSTIN, individually and the marital  
community comprised thereof,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY,  
a foreign insurance company,

Defendant.

CASE NO. 2:11-cv-00927

ORDER ON PLAINTIFFS' MOTION  
TO COMPEL

This matter comes before the Court on Plaintiffs' motion to compel. Dkt. # 28. The Court has reviewed the motion, Defendant's response, Plaintiffs' reply, and all documents submitted in support thereof. The Court has also conducted an *in camera* review of the documents that are the subject of this motion. Having carefully reviewed the foregoing, the Court DENIES the motion.<sup>1</sup>

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<sup>1</sup> Plaintiffs' request to file under seal documents relating to this motion, Dkt. # 26, is GRANTED.

**I. BACKGROUND**

This is an insurance coverage dispute. Plaintiffs Dane C. Johnson and Kathleen M. Justin (collectively, the “Plaintiffs”) own a waterfront home on Puget Sound in the town of Burien (the “Property”). Plaintiffs purchased a “deluxe” homeowner’s insurance policy from Defendant Allstate Insurance Company (“Defendant”) covering the Property (the “Policy”). Plaintiffs allege that a severe windstorm struck the Burien area on November 22 and 23, 2010, that logs and other debris in the water struck their home’s foundation during the storm, and that their home sustained significant damage as a result. Although Plaintiffs tendered a claim for these damages under their homeowner’s policy, Defendant denied that claim on the basis of various policy exclusions.

Plaintiff has made a discovery request for documents relating to Defendant’s investigation and adjustment of their claim. In response to that request, Defendant has produced a document entitled, “Claim History Report,” which catalogues Defendant’s various activity regarding the investigation and adjustment of the claim at issue, in addition to various related activity. Several entries contained within the Claim History Report have been redacted on the basis that they reflect private communications with Mark Cole, an outside attorney who assisted Defendant in connection with its processing of Plaintiffs’ claim. Defendant claims that it is not obligated to produce those entries because they are subject to the attorney-client privilege and work product doctrine.

Plaintiff disagrees, and has now moved to compel production of an un-redacted version of the Claim History Report.

## **II. ANALYSIS**

### A. Washington Substantive Law and Federal Procedural Law Govern this Dispute

Under the *Erie* Doctrine, a federal court sitting in diversity applies federal procedural law and the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The attorney-client privilege, as a substantive evidentiary privilege, is governed by state law. *See* Fed. R. Evid. 501; *Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662, 666 (W.D. Wash. 2007). The work product doctrine, by contrast, is a procedural immunity and is therefore governed by the Federal Rules of Civil Procedure. *See Union Pacific R. Co. v. Mower*, 219 F.3d 1069, 1077 n.8 (9th Cir. 2000).

### B. Attorney-Client Privilege

The attorney-client privilege protects confidential communications between attorneys and clients from discovery or public disclosure. RCW 5.60.060(2)(a); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452 (2004). Because the privilege “impedes full and free discovery of the truth,” it must be strictly construed. *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir. 1989). The attorney-client privilege “[i]s not dependent whatsoever upon the anticipation of litigation, but instead depends upon the nature of the relationship involved.” *Mission Nat’l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986). It protects only communications and advice between attorney and client in the context of a professional relationship involving the attorney *as an attorney*, and not documents prepared for some other purpose. *Schmidt v. California State Auto Ass’n*, 127 F.R.D. 182, 183 (D. Nev. 1989); *Krammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421 (1981). The burden of establishing privilege rests upon the party asserting it. *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, 332 (2005).

“In the insurance context, the question of whether a communication falls within the

1 attorney-client privilege can often be a difficult one because of the investigatory nature of the  
2 insurance business. The line between what constitutes claim handling and the rendition of legal  
3 advice is often more cloudy than crystalline.” *HSS Enter., LLC v. AMCO Ins. Co.*, No. C06-  
4 1485-JPD, 2008 U.S. Dist. LEXIS 11841, \*9 (W.D. Wash. Jan. 14, 2008). “Accordingly, to the  
5 extent that an attorney acts as a claims adjuster, claims process supervisor, or claims  
6 investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply.”  
7 *Id.* at \*10. “The public policy reason behind this conclusion is that insurance companies should  
8 not be permitted to insulate the factual findings of a claims investigation by the involvement of  
9 an attorney to perform, or help perform, such work.” *Id.* at \*10-11.

10 On the instant motion, the relevant inquiry is whether the redacted materials at issue  
11 reflect communications with attorney Cole while he was acting in the role of a claims adjuster,  
12 investigator, or supervisor, or whether those communications occurred while he was acting in the  
13 role of legal advisor. Based upon the privilege log provided to them in connection with the  
14 redacted entries at issue, Plaintiffs assert that Defendant hired Cole not for purposes of providing  
15 legal advice, but instead to assist in the claim investigation and adjustment process. In response,  
16 Defendant asserts that the entries in question “record conversations between Allstate and its  
17 outside counsel in which Allstate is seeking and receiving legal advice.”

18 Having conducted an *in camera* review of the documents in question, it is clear that the  
19 relevant communications reflected therein concern legal advice requested of and provided by  
20 attorney Cole. While it is true that these communications occurred during the claim  
21 investigation / adjustment process, that fact alone does not alter the fact that attorney Cole was  
22 providing legal advice. Because the entries at issue reflect communications concerning  
23 Defendant’s request for and Cole’s provision of legal advice, those materials are subject to the  
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1 attorney-client privilege and are therefore immune from discovery. RCW 5.60.060(2)(a);  
2 *Hangartner*, 151 Wn.2d at 452.

3 Because the Court concludes that the entries at issue are subject to the attorney-client  
4 privilege, it need not address Defendant's assertion that they are also entitled to work product  
5 protection.

6 **III. CONCLUSION**

7 For all of the foregoing reasons, Plaintiffs' motion to compel, Dkt. # 28, is DENIED.  
8 Dated this 5 day of March 2012.

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11 RICARDO S. MARTINEZ  
12 UNITED STATES DISTRICT JUDGE  
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